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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD BERT MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. respectfully moves this Court for leave to file a brief, *amicus curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The interest of *amicus* in the instant case stems from the importance of the issue involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement, nationwide. The issue in this case to which *amicus* addresses itself concerns the permissibility of law enforcement officers questioning a suspect after he has once invoked his Fifth Amendment privilege to remain silent under *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

Many lower courts have construed the language in *Miranda* prohibiting further questioning after the invocation of the privilege as an absolute bar to any subsequent interrogation whatsoever, thus denying to the police the use of one of the most essential tools in criminal investigation. Such a rigid interpretation has an obvious adverse impact on the enforcement of the criminal law. Other lower courts have enunciated a more flexible standard involving subsequent questioning after the privilege has been invoked. The instant case presents this Court with the opportunity to resolve this conflict in the lower courts and, as a consequence, the outcome of the case will be of extreme importance to law enforcement nationwide.

Therefore *amicus* respectfully moves this Court for leave to file this brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

ARGUMENT.

I.

THE RIGIDITY OF THE LANGUAGE IN MIRANDA v. ARIZONA HAS, IN MANY CASES, COMPELLED LOWER COURTS TO SUPPRESS CONFESSIONS AND TO REVERSE THE CONVICTIONS OF FACTUALLY GUILTY DEFENDANTS, DESPITE THE FACT THAT BY ANY OBJECTIVE STANDARD SUCH CONFESSIONS WERE VOLUNTARILY MADE.

One of the common threads which runs through the three opinions of the four dissenting justices in the case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is a sharp criticism of the

absolute rigidity of the mandate of the majority opinion's restrictions upon the essential law enforcement technique of interrogation of criminal suspects.[1]

Thus, Mr. Justice Clark, dissenting, cautioned the majority against the adoption of such "doctrinaire rules." 384 U. S. at 501. Mr. Justice Harlan, dissenting, characterized the action of the majority as being "heavy-handed and one-sided," 384 U. S. at 525. Mr. Justice White, dissenting, described the majority rule in *Miranda* as ". . . a deliberate calculus to prevent interrogation . . .," 384 U. S. at 541. These justices were making the obvious point that, in an area as volatile as the enforcement of the criminal law, the Supreme Court of the United States should not engage in "doctrinaire" or "heavy-handed" pronouncements, particularly where such rulings have neither a basis in Constitutional theory nor in practical reality.

This is precisely what the majority in *Miranda* did, however. The apparent reasoning of the majority has been succinctly described by a qualified observer, Mr. Fred P. Graham, an attorney and the then Supreme Court reporter for the *New York Times*. In his book "The Self-Inflicted Wound"[2], Mr. Graham describes the decisions of the Supreme Court of the United States dealing with the criminal law during the decade of the 1960's. Mr. Graham, who is, incidentally, liberally oriented and basically sympathetic to the "Warren Court's" criminal law decisions, had this to say with regard to the attitude of the majority of the Court in the *Miranda* case:

> This was the core of the Supreme Court's difficulties over *Miranda*—in order to abolish the abuses that cropped up in some but by no means all police investigations, it would have to condemn the "voluntariness" approach which

1. Dissenting opinions of Clark, J., 384 U. S. 436 at 499; Harlan, J., in which Stewart and White, J. J. joined, 384 U. S. 436 at 504; and White, J., in which Stewart and Harlan, J. J. joined, 384 U. S. 436 at 526.

2. Graham, "The Self-Inflicted Wound," The McMillan Company, 1970.

> the Court itself had always approved before and which the police saw as a reasonable way to do their job. If the Court were to frame a prophylactic procedure rigid enough to rule out all of the abuses that the voluntariness approach could permit, *it would also outlaw many instances of reasonable, noncoercive police inquiry about crime.* (Emphasis supplied.)[3]

* * * * *

> Also where the previous landmark decisions had imposed rigid but narrow restrictions on state officials conduct, *Miranda* was to lay down a statute-like code of procedure consisting of four commandments, some of which included sub-commandments.[4]

* * * * *

> Despite the Court's zig-zag course, its trend was clear; it would continue to cast about for an objective standard by which police conduct could be regulated and if the standard proved so rigid that the police could not interrogate at all, that would be a tolerable outcome in [the majority of] the Warren Court's eyes.[5]

Thus have members of this Court and a qualified and objective observer characterized the rigidity of the commands of the *Miranda* decision.

This case presents squarely to this Court the interpretation of that part of the majority opinion in *Miranda* which provides in part that:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in custody interrogation

3. *Ibid.* p. 156.
4. *Ibid.* p. 158.
5. *Ibid.* p. 159.

> operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. 384 U. S. at 473-474.

This is the language from *Miranda* cited by the lower court in the instant case as the substantive basis upon which its decision was predicated.

The admonition continues, in the same vein and, we believe, equally relevant to this case:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. 384 U. S. at 474.

These passages, we submit, typify, perhaps more than any other passages in the opinion, the rigidity, the doctrinaire quality, the heavy handedness and one-sidedness of the majority opinion. They are replete with categorical absolutes. If the suspect indicates "in any manner", "at any time" that he wishes to remain silent, then the investigation "must" cease. Likewise, if he indicates that he wants an attorney, questioning "must" cease until the attorney is present and the attorney "must" have the opportunity to be present during questioning. The command is seemingly made absolute: the refusal to speak or the request for counsel forecloses the right of the police to interrogate criminal suspects.

Certainly many lower courts, including the one in the instant case have treated the foregoing language as absolute, with the result that, in many cases, confessions which are by every standard of logic and common sense voluntary and reliable, have been suppressed, and convictions which would have been upheld without question under pre-*Miranda* standards have been reversed. The truth of the matter—the question of the actual guilt or innocence of the accused—becomes irrelevant.

One lower court has characterized the situation resulting from the rigidity of the *Miranda* dictates with admirable candor. In *United States ex rel. Chabonian* v. *Leik, Director,* 366 F. Supp. 72, E. D. Wis. (1973), the court in granting the petitioner habeas corpus relief,[6] interpreted the dictate of *Miranda* that questioning must cease once an attorney is asked for most strictly against the government. In the course of its opinion the court noted that the pre-*Miranda* standard for the admissibility of confessions was that of voluntariness but that the focus of the Supreme Court had:

> ". . . been broadened from protecting the *innocent* from the possibility of a false confession to protecting the *guilty* from unfair methods of procuring statements from him. 366 F. Supp. at 76 (Emphasis supplied).

This, we submit, is the crux of the entire matter. The law and the teachings of this Court have always been directed towards the protection of the innocent from truly unfair or coercive methods of interrogation through the application of the Due Process clause of the Fifth and Fourteenth Amendments, even though a by-product of that commendable concern may result in the acquittal of guilty defendants. *Brown* v. *Mississippi,* 297 U. S. 278 (1936); *Haynes* v. *State of Washington,* 373 U. S. 503 (1963). No one, certainly not *amicus* in this case, should quarrel with this principle. In *Miranda,* however, the sheer rigidity of its "doctrinaire" and "heavy handed" dictates of the opinion have resulted in the protection only of the *guilty* because police methods of interrogation which are *not* unfair or coercive in the least by any objective standard have been made so by the inflexibility of the *Miranda* opinion.

Following are concrete examples of this, taken from recent appellate cases which deal with those provisions of *Miranda* which purport to foreclose any interrogation once a refusal to speak is made or an attorney is asked for:

—Case No. 1 *People* v. *Milton,* 75 Cal Rptr. 803, Court of Appeal of California (1969).

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6. Title 28 U. S. C. No. 2241 *et seq.*

Defendant, when arrested for the murder of his wife was given the proper *Miranda* advisements by the arresting officer, at which time he stated that he did not wish to make a statement. Some two hours later a detective, who was apparently unaware of the previous warning and refusal to make a statement, again properly advised the defendant of his rights, whereupon the defendant made admissions which were inconsistent with his later trial testimony. The appellate court held that the admissions should have been excluded. Defendant's murder conviction was thus reversed, *despite the fact that the second interrogator was unaware of the first refusal and that the admissions made at the second interrogation were apparently voluntary.*

—Case No. 2 *Scott* v. *State,* 475 S. W. 2d 699, Supreme Court of Arkansas (1972).

In reversing the defendant's conviction for the rape of a two-year-old girl, the court noted in this case that there were no eyewitnesses to this crime, as the victim was too young, and the only other witness, her father, had been killed in an automobile accident. Defendant was properly advised and refused to make a statement. Then, according to the Court: "About three months later a deputy sheriff who was passing the cell where Scott was confined asked him, in the course of what appears to have been a bantering conversation, if he had raped the little girl. Scott replied, 'yeah'."

This statement was held invalid as not being voluntarily made under *Miranda* and the rape conviction was reversed.

—Case No. 3 *U. S. ex rel. Chabonian* v. *Leik, Director,* 366 F. Supp. 72, E. D. Wis. (1973).

Defendant had been convicted of receiving and having in his possession a stolen car. He was advised of his rights under *Miranda* on three different occasions; he asked for counsel after his arrest and counsel was provided. Defendant, his father, his attorney, two detectives, a state's witness, and his attorney were in a hallway of the Safety Building going back and forth between the office of the district attorney and the issuing magistrate.

All of the group of seven were not in earshot of each other at any given time, but apparently defenadnt's attorney was physically present at all times relevant. A detective remarked to defendant's *father* that ". . . he should talk to his son because his son was on probation now and if he didn't tell the truth, he was going to be hurt by it." Later, on one of the back and forth trips, defendant told one of the detectives ". . . that he knew the automobile was stolen." The United States District Court held the statement inadmissible because the state had failed to prove a knowing waiver of the right to the presence of counsel.

—Case No. 4 *United States* v. *Clark,* 499 F. 2d 802, 4th Cir. (1974)

Defendant was arrested for bank robbery, was twice advised of his rights and each time declined to make a statement, whereupon questioning ceased both times. Some three hours later FBI agents, while fingerprinting defendant, confronted him with the statements of an accomplice, again advised him of his rights, and asked him for a statement. No coercive tactics were used although one of the FBI agents testified that he told defendant that it would be better for him to tell the truth. At this point the defendant made a verbal inculpatory statement.

The court held this statement inadmissible, finding that the defendant had made no voluntary waiver of his rights.

—Case No. 5 *State* v. *Lachapelle,* 308 A. 2d 467, Supreme Ct. R. I. (1973).

Defendant had been arrested for murder. He was advised of his rights and requested an attorney. While waiting for the attorney to arrive defendant remarked to an officer: "I'm really in a jam this time" and inquired as to what would happen to him. The officer replied that he did not know and then asked defendant why he had used a knife on the victim. Defendant replied that he had a "beef" to straighten out. The

officer then asked defendant what he had done with the knife and defendant told him.

On appeal these statements were held to be inadmissible.

—Case No. 5 *Commonwealth* v. *Mercier*, 302 A. 2d 337, S. Ct. Pa. (1973).

Defendant arrived voluntarily at the police station with his mother and sister in response to a murder investigation. He was advised of his rights and requested the assistance of counsel. Questioning ceased, but the detectives read to him a statement of an accomplice which implicated him. Defendant then conferred with his family for at least 30 minutes and then after additional advisements agreed to take a polygraph test and made a confession as to his involvement.

The court held that no voluntary waiver of rights was made and that the confession was inadmissible.

These are examples of cases in which the rigidity of the language from *Miranda* quoted above at pp. 3-4 forced lower courts to suppress confessions which by any objective standard appear to be completely voluntary. In none of the cases were coercive tactics used which would indicate that the will of the suspect was overborne, and in every case it was conceded that proper advisements were given, often many times over.

We submit that *but for* the rigidity of the prohibition against *any* subsequent questioning the lower courts would almost certainly have found all of the statements made to have been voluntary and in each case the defendants were found at trial, to have been guilty. Thus we see the situation in which the "doctrinaire" and "heavy handed" dictates of *Miranda* have served as a shield *only* for the guilty, and not from unfair or oppressive police tactics, but rather from good-faith, non-coercive efforts of law enforcement officers to investigate crimes.

This case presents this Court with a vehicle whereby it can relax the rigidty of the *Miranda* decision with regard to the admission of statements made subsequent to the giving of the

required warnings and a refusal to speak or a request for an attorney. As will be discussed in the next section of this argument there is a substantial body of law which takes a far less rigid view of the provisions of *Miranda*, and which applies to the case at bar. As the foregoing examples demonstrate, however, there are still many lower courts which apply *Miranda* in its most inflexible form. They apparently feel that they have no choice but to do so.

The two lines of cases create an obvious conflict. We urge this Court to resolve this conflict in favor of a realistic concern for the needs of law enforcement, which can be met without doing the slightest violence to basic Fifth Amendment rights, and against the contrived protections of the rights of the guilty which the language of *Miranda* purports to dictate.

II.

THIS COURT SHOULD PROMULGATE A RULE OF REASON TO GUIDE LOWER COURTS IN ASSESSING THE VOLUNTARINESS OF CONFESSIONS OF OTHER STATEMENTS MADE AFTER MIRANDA WARNINGS HAVE BEEN GIVEN AND A REFUSAL TO SPEAK OR A REQUEST FOR AN ATTORNEY HAS BEEN MADE.

Despite the inflexibility of the dictates of the majority in the *Miranda* decision which seemingly foreclose *any* interrogation once an individual has been advised of his rights and has invoked the privilege by refusing to speak or by requesting an attorney, a substantial body of law has grown up which has applied a test of reasonableness to police conduct in the course of subsequent interrogations.

As was noted in Section I of this argument, there is an obvious tension between this body of case law and the previously described cases in which the dictates of *Miranda* have been applied as absolute prohibitions against any sort of subsequent interrogation. This case presents to this Court an opportunity

to resolve this tension and we urge it to resolve the question in favor of the rule of reason.

The fact is, of course, patent, that this Court and only this Court can resolve the conflict *definitively* because *Miranda* was decided on the basis of the Fifth and Sixth Amendments to the Constitution of the United States. This underscores the importance of the instant case, for there is very definitely a split of authority throughout the nation on this issue.

The rule of reason approach can be found in those cases which have held that there can be a subsequent interrogation and a request to a suspect to reconsider his prior invocation of the privilege so long as unwarranted pressures are not put upon him to talk after he has refused to speak or has asked for an attorney.

What the lower courts consider to be unwarranted pressures may be found in those cases in which a subsequent interrogation has been upheld as not violative of *Miranda* because the police kept the defendant advised of his rights and did *not* engage in tactics as:

—". . . prompting, cajoling, harassment, threats or inducements . . ." *Hill* v. *Wheaton, Sup't.* 490 F. 2d 629, 6th Cir. 1974.

—". . . continued importunity or coercive interrogation in the guise of a request for reconsideration." *People* v. *Gary,* 31 N. Y. 2d 68, Ct. App. N. Y. (1972).

—refusing "to take 'no' for an answer" and continuing "to question, harass and coerce the defendant to cast aside his desire to exercise his right to remain silent." *People* v. *Naranjo,* 509 P. 2d 1235, (1973).

—". . . persistent police exhortations . . ." *People* v. *Pittman,* 302 N. E. 2d 7, S. Ct. Ill. (1973).

—employing "techniques of persuasion or inducement." *Holloway* v. *U. S.,* 495 F. 2d 835, 10th Cir. (1974).

The rule of reason is perhaps best summarized by the statement of the court in *U. S.* v. *Collins,* 462 F. 2d 792, 2d Cir. (1972). In that case the defendant was interrogated on six different occasions over a 24-hour period and was advised of his rights prior to each interrogation. Defendant exercised his rights on five occasions and interrogation ceased. On the sixth occasion he confessed. The court held that the statement was admissible, and that no *Miranda* violation took place despite the officers' efforts to make Collins reconsider his refusal to talk, stating:

> So long as such reconsideration is urged in a careful, non-coercive manner at not too great length and in the context that a defendant's assertion of his right not to speak will be honored, it does not violate the *Miranda* mandate. 462 F. 2d at 796.

See also: *Massimo* v. *U. S.,* 463 F. 2d 1171, 2nd Cir. (1972).

We have not attempted in this section to deal exhaustively with the law on the subject, as this has been done by the State of Michigan in its brief in chief. We have merely attempted to define the two bodies of conflicting case law which the instant case presents to this Court for resolution.

We urge, again, that this Court adopt the rule of reason approach just described and decide this case accordingly. The Court has not been reluctant, in the past, to set limits on the over rigid requirements of the *Miranda* decision. *Harris* v. *New York,* 401 U. S. 222 (1971); *Lego* v. *Twomey,* 404 U. S. 477 (1971); *Michigan* v. *Tucker,* 417 U. S. 433 (1974); *Oregon* v. *Hass,* .... U. S. ...., 43 L. W. 4417, (1975). We believe that this case presents a similar opportunity for the following reasons:

1. As in the cases noted in Section I it is highly likely that, but for the rigidity of the passage from *Miranda* cited by the lower court as authority for its position, Mosley's confession would have been admissible.

2. There is no evidence in the record that any coercive tactics were used on Mosley. To the contrary, it is conceded

that he was given proper *Miranda* warnings on both occasions on which he was questioned; thus it is apparent that the officers involved acted in good faith, as was the case in *Michigan* v. *Tucker*, supra.

3. If this Court reverses in the instant case and follows the rule of reason as enunciated by the lower court cases described in this section of our argument, no violence will have been done to fundamental Fifth Amendment rights because even in the "rule of reason" cases described the police will not be permitted to use coercive tactics or to importune criminal suspects into confessing. *United States* v. *Collins*, supra.

4. Lower courts will not be forced to reverse conviction for serious crimes in which, as in the instant case, the factual guilt of the defendant, as found by a jury, is evident.

We submit that the foregoing reasons should convince this Court to follow the rule of reason approach of the lower courts, as exemplified by the cases cited in this section, to the issue presented in this case.

CONCLUSION.

Lower courts have differed greatly in their interpretation of the language in *Miranda* which purports to forbid any subsequently questioning of suspects who have once invoked their Fifth Amendment privilege. Many courts have construed the language as an absolute prohibition on subsequent questioning and have, as a result, suppressed confessions that were otherwise completely voluntary. Other courts have applied a rule of reason, permitting subsequent questioning so long as coercive tactics were not used and the will of the suspect was not overborne.

Amicus submits that the latter interpretation is the proper one given the fact that interrogation of criminal suspects is an absolutely essential law enforcement technique and that the more rigid interpretation serves only to protect the guilty. We urge this Court to reverse in the instant case.

Respectfully submitted,

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